

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent in mid-March 2011, as a field inspector. Her job was to test construction materials. She was given a company vehicle to travel to the construction sites. Claimant testified that on average she gets in and out of the company vehicle 20 or 30 times per day. She testified that the surfaces she exits her vehicle on to vary from loose dirt to loose gravel to pavement and grass.

Claimant injured her right knee on September 27, 2011, as she stepped out of her vehicle to take some soil densities, and felt a pop in her right knee. Claimant felt an immediate sharp and shooting pain in her knee. She was unsure of the surface that she stepped onto, testifying that it could have been pavement, loose gravel or the edge of some grass.

When claimant exited the vehicle she was in the process of making her way to the back of her vehicle to pull out a nuclear gauge to test for soil density moisture content. This is a piece of equipment used on a regular basis in the performance of her job for respondent.

Claimant immediately reported the accident and injury to respondent and was sent to K-Stat, a medical clinic in Manhattan, Kansas, to be checked out. She was given temporary light restrictions and returned to work. Later claimant was referred to Daniel T. Hinkin, M.D., at the Orthopedic & Sports Medicine Center in Manhattan, Kansas. Claimant was taken off work from October 21, 2011 through November 1 or 2, 2011. She then returned to work until December 8, 2011, when she was told that workers compensation denied her claim. At that time claimant was restricted from work until she was released by her doctor to full activity with no undue restrictions.¹

Claimant had surgery on her right knee with Dr. Hinkin on December 21, 2011, and was placed on light duty with temporary restrictions, but has not worked since December 8, 2011. Claimant continues to have problems with her right knee. She denies any previous knee problems.

Claimant received additional treatment for her right knee because she developed a blood clot after surgery. She was prescribed blood thinners and her condition is being monitored by Dr. Jacqi Seaton. Claimant testified that she is able to work within her restrictions, but respondent will not take her back with restrictions.

¹ P.H. Trans. at 12-13.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.⁴

K.S.A. 2011 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 508(f)(1)(2)(B)(3)(A) states:

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

² K.S.A. 2011 Supp. 501b and K.S.A. 2011 Supp. 44-508(h).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 2011 Supp. 501b(b).

(I) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(g)(h) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

It is uncontroverted that claimant suffered an injury as above defined. When she stepped out of the truck, she experienced an immediate onset of pain in her right knee. Ultimately, claimant was forced to undergo surgery to repair the damage.

The question is whether this injury arose out of her employment. As the accident and resulting injury occurred as claimant was getting out of her employer provided truck, to retrieve an piece of equipment for the specific purpose of performing one of the duties of her job, it would seem that the accident occurred in the course of her employment. However, the Kansas legislature has significantly amended the Kansas Workers Compensation Act (Act), applying a stricter burden to claimant than before.

The ALJ, in the February 23, 2012 Preliminary Hearing Order, determined that the accident and resulting injury were the result of a risk which was “not particular to the job”. Thus, the ALJ apparently concluded that the risk was of a neutral nature. Under the new version of K.S.A. 44-508(f)(3), a neutral risk is no longer compensable in Kansas. Additionally, an idiopathic injury is no longer compensable. Here, claimant felt a sudden pain in her knee. But she was unable to identify the cause of the injury. She did not describe a slip on a slick surface, nor did she describe a trip, twist, slip or any other cause for the onset of her knee pain other than simply stepping out of the truck. Claimant was not even able to describe the surface she placed her foot on. The determination by the ALJ that the 2011 version of K.S.A. 44-508(f) prohibits an award in this matter is affirmed. Claimant has failed to satisfy her burden of proving that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. The denial of benefits is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. The denial of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated February 23, 2012, is affirmed.

⁵ K.S.A. 2011 Supp. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
jeff@jkcooperlaw.com

Karl L. Wenger, Attorney for Respondent and its Insurance Carrier
kwenger@mvplaw.com
mvpkc@mvplaw.com

Rebecca Sanders, Administrative Law Judge